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In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 363

DOVIE RAY BAKER *et al.*, *Petitioners*

v.

TEXAS AND PACIFIC RAILWAY CO., *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the Court of Civil Appeals for the 5th Supreme Judicial District of Texas

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Petitioners, Dovie Ray Baker, individually and as administratrix of the estate of Claude Baker and as next friend of her minor children, Bobby Glen Baker, Claudette Baker and Oleta Fay Baker, pray that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the 5th Supreme Judicial District of Texas entered in the above entitled case on December 6, 1957.

I. Citation to Opinion Below

The opinion of the Court of Civil Appeals, printed in Appendix "A" hereto, pp. 25-47, is not officially reported

but is printed in 309 S.W. 2d 508. The Supreme Court of Texas wrote no opinion in refusing Petitioners' application for a writ of error.

II. Jurisdiction

The judgment of the Court of Civil Appeals was entered on December 6, 1957. Appendix "A" hereto, pages 47, 48. The order denying Petitioner's motion for rehearing by said Court of Civil Appeals was rendered and entered on January 17, 1958, Appendix "A" hereto, page 48. Petitioners' application for writ of error to the Supreme Court of Texas, timely filed, was refused, no reversible error on April 30, 1958, Appendix "A" hereto, page 49. The order denying Petitioners' motion for a rehearing of their application for writ of error by the Texas Supreme Court was rendered and entered on June 18, 1958, Appendix "A" hereto, page 50. The Court of Civil Appeals thus became in this case the highest court of the state in which a decision could be had. *Panhandle Eastern Pipe Line Company v. Calvert*, 347 U.S. 157, 98 L ed 583, 74 S Ct 396 (1954).

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3) because Petitioners' cause of action is under the Federal Employers Liability Act, 35 Stat. 65, 45 U. S. C., Sections 51 et seq., and because a right and privilege is specially set up and claimed under said act and under the Constitution of the United States,

and because the Court of Civil Appeals has decided questions of substance under that Act not heretofore determined by this Court and decided in a way probably not in accord with the applicable decisions of this Court.

III. Questions Presented

Petitioners are the widow and minor children of Claude Baker, who was killed when struck by Respondent's train on the 20th day of August, 1952, while in the regular course of his employment with W. H. Nichols & Co. as a member of a crew doing a type of maintenance work for Respondent called "grouting" along the Respondent's main line double tracks. It is stipulated that the main line double tracks are used in the movement of freight and passenger trains in interstate commerce. Respondent's east and west-bound trains were passing each other at the time Baker was struck and the jury found that the negligence of Respondent's enginemen on the east-bound train which struck Baker was a proximate cause of Baker's death; that Baker's own negligence was a proximate cause of his death; and that Petitioners' damages totaled $28,045.00. None of these findings have been questioned on appeal. Substantial evidence was introduced that W. H. Nichols & Co. was not an independent contractor. The trial court, refusing to permit Petitioners to present their case to the jury under the Federal Employers Liability Act (hereinafter called FELA), but applying state law, entered judgment for Respondent that Petitioners take nothing by their suit, which

judgment was affirmed by the Texas appellate courts. The questions presented are:

1. Whether the Texas courts have the power to deny Petitioners a jury trial to determine their federal rights under FELA when substantial evidence was introduced that the employer of the deceased, Claude Baker, doing maintenance work on Respondent's main line railroad bed, was not an independent contractor but a mere agent of Respondent.

2. Whether Respondent had the power to exempt itself from liability to Petitioners under FELA by attempting to delegate to the employer of Claude Baker some of its duties imposed by law to maintain its main line roadbed carrying interstate commerce.

3. Whether Claude Baker was an employee of Respondent within the meaning of FELA because he was doing the work of Respondent closely and substantially affecting, and in the furtherance of, interstate commerce.

IV. Constitutional Provision and Statutes Involved

1. The constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States.

2. The statutory provisions involved are Sections 1 and 5 of the Federal Employers Liability Act, 35 Stat. 65, 66, 53 Stat. 1404, 45 U.S.C., Sections 51 and 55, and paragraphs (3), (4) and (21) of Section 1 of the Interstate Commerce Act, 41 Stat. 474, 49 U.S.C., Sections 1 (3), (4) and (21). They are printed in Appendix "B" hereto (pp. 51-55).

V. Statement

("Tr" herein refers to the Transcript. "SF" refers to the Statement of Facts which is a separate document under Texas appellate practice.)

1. Material Facts

Claude Baker had been hired by W. H. Nichols & Co. (hereinafter called Nichols) and received his wage payments from Nichols. (SF 26.) After Baker was killed Petitioners filed a claim for workmen's compensation benefits and received a lump sum settlement from the compensation carrier for Nichols (SF 194-196). However, when Petitioners' counsel became aware of the nature of Baker's duties and of the contract between Nichols and Respondent, Petitioners' complaint and petition against Respondent originally based on a common law action for negligence, was amended to set forth a claim based on FELA (SF 202, 203, 211, 212). The basis of Petitioners' claim under FELA was that the contract between Respondent and Nichols provided that Nichols was to do certain maintenance and repair work on Respondent's railway tracts used in interstate commerce; and that although the contract specified that Nichols was an independent contractor, the arrangement was in truth and in fact made to evade the provisions of FELA since Respondent had the right to control the details and the manner in which Nichols performed such maintenance work; and that at the time Baker was killed he was performing work for Respondent in the furtherance of interstate commerce and was performing work so closely and substantially affecting interstate commerce as to en-

title Petitioners to the benefit of the Federal Employers Liability Act and as to bring Baker within its terms and provisions. (Tr 4-7).

Evidence introduced to support Petitioners' claim under FELA include the contract and the extension of the contract between Respondent and Nichols. (Printed in the opinion of the Court of Civil Appeals. Appendix "A" hereto, pp. 26-29.) It provided for Nichols to furnish labor, equipment and water for grouting the roadbed of Respondent's double track main line at certain locations as specified by Respondent to the satisfaction of Respondent's chief engineer or his duly authorized representative. Sections 4 and 5 of the contract provided that Nichols indemnify Respondent for any and all liability arising from the contract or work performed under it.

Evidence was introduced that Respondent's assistant chief engineer's principal duties were to supervise the railroad division employees working on the maintenance of the roadbed and tracks and to make appropriations to the various divisions of the railroad for the upkeep of the tracks and structures (SF 163); that grouting work was for the purpose of sustaining, stabilizing and strengthening the roadbed by filling cracks and crevices with a cement mix (SF 13, 14, 170) and is a method of putting the mix into the embankment to fill the voids and force out the water from water pockets that form in the roadbed embankment (SF 170), the locations of which were laid out in the engineering department of Respondent (SF 332,

333); that maintenance of the roadbed and tracks is principally a matter of keeping the tracks in a safe and good riding condition (SF 165) that low spots make the roadbed unsafe and interfere with the operation of high-speed trains and their elimination is a necessary part of the maintenance of the roadbed (SF 166); that grouting is one type of maintenance work done to preserve the roadbed in good condition. Respondent's assistant chief engineer first agreed that grouting work is simply part of the regular maintenance of the track; later he called it a special type of maintenance (SF 175) and still later he said he "would consider it rather extraordinary maintenance." (SF 371.)

Although by Section 3 of the contract between Respondent and Nichols it is declared that Nichols "shall occupy the status of an independent contractor and shall not be subject to the detailed supervision and direction of the carrier (Respondent) but responsible to carrier only for the final results in the accomplishment of such work or services," Section 1 provided that Nichols was to grout roadbed at locations as specified by Respondent's chief engineer. Voluminous testimony by numerous members of the grouting crew may be summarized to show that in actuality they had been told by Nichols' foreman to obey the orders of Respondent's inspector, Slaton, who was on the job all the time while the crew was working. (SF 34, 70-75, 80, 84, 94, 102, 107); that the men obeyed Slaton (SF 34, 84); that Respondent's inspector Slaton would tell the crew members to thicken or thin the grout being used by

adding more sand, cement or water (SF 32, 84, 93, 94, 102, 121); that no one but Slaton marked off the places in the roadbed where the points were to be driven into the ground so that the grout mixture could be pumped therein; that the selection of such places was left solely up to Slaton (SF 32, 33, 83-85, 93, 102); that neither the pointman of the crew nor anyone else except Slaton had anything to do with the selection of the places where the points would be driven in the ground (SF 84, 85, 102) and that Slaton would tell the men when and where to move to a new location after the grouting was finished at an old location (SF 31, 84). A primary duty of Slaton was to prevent the grouting under pressure from humping or throwing the tracks out of cross level by seeing that the men did not pump too much mixture in the embankment (SF 376, 377). Also to put out slow flags to let the trainmen know the grouting crew was at work and to see that the grouting work did not interfere with the operation of the trains (SF 176).

Even cross-examination by Respondent's own counsel brought out certain facts raising a question about Nichols' status as an independent contractor, in that Slaton would tell a crew member to move a grouting point from the ground when the mixture bubbled out due to the inattentiveness of a crew member (SF 88) and one crew member when asked whether he worked for the T & P Railroad answered: "I don't know whether I was or not. I might—I might have been working for both. It was all I knew. I just—I was on the T & P railroad work." (SF 118.)

Respondent's assistant chief engineer admitted that if Respondent's roadmaster had decided after a period of time that all the grouting work needed had been done he had the right under the contract to terminate the work and that the area to be grouted was up to the railroad, as well as the number of feet to be worked (SF 179-a, 372); that the contract did not cover any specific amount of money but that was left open to be determined from time to time (SF 373) and that the contract could be canceled by Respondent at any time (SF 375). Evidence was also furnished by Respondent's assistant chief engineer that Respondent at any time (SF 375).

Evidence was also furnished by Respondent's assistant chief engineer that Respondent furnished the sand and cement used in the grouting mixture (SF 172) and that the contract provided that Respondent was to transport Nichols' men and equipment by railroad to and from the site of the work without charge; that Respondent could do the grouting work itself if it had the equipment; that the equipment used was a hydraulic pump that forced the grouting materital into the railroad embankment under pressure; that such pumps are in common use in construction work and are available for purchase by Respondent (SF 172); that there was no skill required of grouting crew members in mixing the sand and cement and putting the points in the ground (SF 341); that the crew members were laboring men and rather uneducated (SF 381). Claude Baker's job was handling cement (SF 12) and he did farming and raised cotton in addition to his grouting work (SF 10, 11).

2. How Federal Questions Were Presented in the State Courts

Before the case was submitted to the jury, Petitioners asked the trial court to submit their specially requested issue No. 1 and later their specially requested issue No. 13. These specially requested issues were substantially identical and No. 13 reads as follows:

> "Do you find from a preponderance of the evidence that at the time Claude Baker, deceased, sustained his fatal injuries, W. H. Nichols & Company, Inc., did not bear the relationship to Texas & Pacific Railway Company of an independent contractor, as that term has been defined herein for you.
>
> "Answer 'It was not an independent contractor' or 'it was an independent contractor'.
>
> "Answer . . . . . .
>
> " 'An independent contractor' as used in the above Special Issue is meant any person, who, in the pursuit of a business or occasion undertakes to do a particular work for other persons, and who has control of such work in respect to the details of the work to be performed, and over whom the person for whom the work is being done, has no right or control as to such details, and who represents the will of the person for whom the work is done, only as to the result of this work, and not as to the means or method by which it is accomplished."

The Petitioners also requested the court to submit to the jury their specially requested issue No. 12 reading as follows:

> "What do you find in terms of percentage to be the entire causal negligence, if any, attributable to Claude

Baker, deceased, and what attributable to Defendant, Texas & Pacific Railway Company?

"Answer: Attributable to Claude Baker, deceased per cent.

"Answer: Attributable to the Texas & Pacific Railway Company per cent."

But the court refused to submit to the jury any of the said specially requested issues. (Tr. 90-95.)

On appeal to the Texas Court of Civil Appeals the following points were preserved and argued to the said court:

> "**First Point**—The Court erred in failing to submit Plaintiff's Specially Requested Issue No. 12, inquiring as to the percentage of negligence attributable to Defendant and that attributable to Claude Baker, deceased, because the evidence established as a matter of law that Claude Baker was covered by the provisions of the Federal Employers Liability Act and therefore his contributory negligence was not a complete defense to Plaintiffs' suit but would only diminish their recovery and Plaintiffs were entitled to have their theory of the case submitted in such issue. (Germane to Assignment of Error No. 15, Tr, p. 78)."

> "**Second Point**—The evidence was sufficient to raise the question of whether or not W. H. Nichols & Company, Inc. was an independent contractor, and therefore, the Court erred in failing to submit either Plaintiffs' Specially Requested Issue No. 1 or No. 13, inquiring as to such fact, which issue was raised by Plaintiffs' pleadings. (Germane to Assignments of Error Nos. 11 and 16, Tr, pp. 76-78.)"

After the trial court's judgment was affirmed by the Court of Civil Appeals and Plaintiffs' motion for rehearing was overruled by the said court, Plaintiffs then applied

for a writ of error to the Supreme Court of Texas, urging the following points:

"**Point of Error Number One.** The Court of Civil Appeals erred in holding that Petitioners were not entitled to submission of their Requested Issue No. 12 under the Federal Employers Liability Act (45 U.S.C., Sect. 51) because the Deceased, Claude Baker, was within the scope and coverage of that Act, and therefore Petitioners were deprived of their affirmative theory of the case. (Germane to Assignment of Error No. 15, and Points of Error Nos. 1 and 2 in Petitioners' Motion for Rehearing.)

"**Point of Error Number Two.** The Court of Civil Appeals erred in holding that Petitioners were not entitled to affirmative submission of their case under the Federal Employers Liability Act (45 U.S.C., Section 51) because they failed to request an issue inquiring into the intent and purpose of the contract between Deceased's employer and the Texas & Pacific Railway Company. (Germane to Point of Error No. 1, in Petitioners' motion for Rehearing.)

"**Point of Error Number Three.** The Court of Civil Appeals erred in holding that Petitioners were not entitled to submission of their affirmative theory of the case under the Federal Employers Liability Act (U.S.C., Sect. 51) because of their failure to request an issue inquiring whether the maintenance work that Deceased was performing at the time of his death was ordinary or extraordinary maintenance. (Germane to Point of Error No. 2 in Petitioners' Motion for Rehearing.)

"**Point of Error Number Four.** The Court of Civil Appeals erred in holding that there was no evidence that W. H. Nichols & Company, the Deceased's employer, was not acting as an independent contractor

at the time Deceased met his death. (Germane to Point of Error No. 3 in Petitioners' Motion for Rehearing.)"

The Supreme Court refused Petitioners' application for writ of error and Petitioners filed a motion for rehearing which again brought to the attention of the Supreme Court of Texas the points brought forth in Petitioners' application for writ of error. The Supreme Court of Texas subsequently overruled Petitioners' motion for rehearing on their application for writ of error.

VI. Reasons for Granting the Writ

1. The Writ should be Granted because Petitioners were denied a jury trial on the issues raised under FELA.

The judgment of the Court of Civil Appeals and the refusal of the Supreme Court of Texas to grant a writ of error, if allowed to stand, will deprive Petitioners of their constitutional rights and their rights under FELA to a trial by jury. The jury was not permitted to pass on the question of whether Nichols was an independent contractor or merely an agent of Respondent. If Nichols was merely an agent of Respondent then the deceased employee, Baker, came under the protection and within the benefits of FELA. The Seventh Amendment to the Constitution provides that the right of trial by jury shall be preserved. And the jury is "part and parcel of the remedy for railroad workers under the Employers Liability Act." *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 354, 87 L ed 1444, 1448 63 S Ct 1115 1119 (1943). A mere reading of the statement hereof clearly demonstrates that the evidence

raised the issue of whether Baker's employer, Nichols, was or was not an independent contractor, therefore it should have gone to the jury. *Schulz v. Pennsylvania R. Co.*, 350 U. S. 523, 100 L ed 668, 76 S Ct 608 (1956). Indeed, the evidence is comparable in strength to the evidence in cases where it has been held as a matter of law that the nominal employer of the injured worker was not an independent contractor. *Pennsylvania R. Co. v. Barlion*, 172 F. 2d 710 (6th Cir. 1949); *Downs v. Baltimore & Ohio R. Co.*, 345 Ill. App. 118, 102 N.E. 2d 537, 30 ALR 2d 503 (1951).

However, the first and main point that Petitioners desire to present is that the issue before the trial court and Texas Court of Civil Appeals was whether there was any evidence and reasonable inferences in the record by which the jury could find that Nichols was not an independent contractor; that despite all of the evidence introduced which would enable a jury to reasonably find that Nichols was not an independent contractor, the trial court refused to let the jury pass on such issue and the trial court's refusal has been affirmed. The result is that Petitioners were effectively prevented from presenting their case under FELA to the jury.

If this judgment is allowed to stand, Claude Baker and workers like Baker doing the railroad's work and exposed to the dangers of such work, are deprived of a jury trial to determine whether they come under the provisions of FELA. If allowed to stand this judgment is an invitation to railroads to relieve themselves of many of their obligations under FELA by doing their maintenance work

through so-called independent contractors. The judgment allows form to triumph over substance. These results are not within the intent of Congress in enacting Sections 51 and 55 of FELA as amended, and this Court has not permitted such results to stand. *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 2 L ed 2d 799, 78 S Ct 758 (1958). *Rogers v. Missouri P. R. Co.*, 352 U.S. 500, L ed 2d 493, 77 S Ct 443 (1957).

The refusal of the trial court to tender to the jury Petitioners' specially requested issues effectively deprived Petitioners of a jury trial on their affirmative theories under FELA but the opinion of the Court of Civil Appeals neither clearly states nor properly analyzes this fundamental problem. No authority cited by it is on the point in question and no authority has been found that supports its judgment. Its opinion does not apply the established federal rule that in passing on whether there is sufficient evidence to submit the issue to the jury it should look only to the evidence and reasonable inferences which support Petitioners' case. *Wilkerson v. McCarthy*, 336 U.S. 53, 57, 93 L ed 497, 502, 69 S Ct 413 (1949). Its opinion does not recognize the duty of the court under FELA to see that Petitioners' asserted federal rights governed by federal law are fully protected as the Congress intended them to be. *Arnold v. Panhandle & Santa Fe Ry. Co.*, 353 U.S. 360, 1 L ed 889, 77 S Ct 840 (1957). Instead the opinion clutches at straws to reach the erroneous conclusion that the trial court was correct in its denial to Petitioners of a jury trial on FELA issues.

Without going into a detailed analysis of that part of the opinion dealing with the issue in question, it is pointed out that the opinion looks principally to evidence deemed favorable to Respondent and draws only inferences favorable to Respondent. By these means it reaches the untenable conclusion that there was no evidence for the jury to pass on. Its reasoning is that although Respondent did have and did exercise actual control of Nichols' employees concerning the details of their work, Respondent did not have the "right" to such control. Appendix "A" hereto, pp. 42, 43.

Cimorelli v. New York Central Ry. Co., 148 F. 2d 575 (C.C.A. 9th 1945) is cited to support this conclusion. But the *Cimorelli* case, strongly analogous on its facts to instant case is flatly contra to the Court of Civil Appeals' decision on the issue in question. In the *Cimorelli* case the trial court held as a matter of law that the Duffy Construction Co. was an independent contractor but this holding was reversed on appeal. In instant case the trial court held as a matter of law that Nichols was an independent contractor and the Court of Civil Appeals affirmed that decision. In the *Cimorelli* case Duffy loaded and unloaded the carrier's cars under a contract with the carrier providing that Duffy was an independent contractor. But the Circuit Court of Appeals reasoned that because of the very nature of the work its performance could not be committed exclusively to the discretion of Duffy, that necessarily the carrier had the right to control and therefore the contractor (Duffy) could not be independent. The facts in the instant case support this reasoning. And they also support

the reasoning of the Circuit Court of Appeals at page 579 in the *Cimorelli* case that the carrier could not discharge its obligations if it had delegated to Duffy the exclusive right to do the work without supervision as to when, where and how the work was to be done.

It is submitted that the more reasonable conclusion in instant case and one that a jury might well make if it had an opportunity is that actual control of the details of the work of Nichols' employees by Respondent indicate that Respondent had the right and authority to exercise such control. "Fairminded men might reach different conclusions—" *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 353, 87 L ed 1444, 1447, 63 S Ct 1115, 1118 (1943). Certainly the Court of Civil Appeals' conclusion cannot be valid under the rules of his honorable Court, because the duty and obligation of the trial court and of the Court of Civil Appeals was to consider the evidence and all reasonable implications arising therefrom, even though they may be conflicting, to determine if the fact issue was raised for the jury's decision as to whether Nichols was or was not an independent contractor. *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523, 100 L ed 668, 76 S Ct 608 (1956).

The admitted fact that Respondent did exercise control and give directions to Nichols' employees concerning the details of their work was substantial evidence in itself that Respondent had the right and authority, as well as the power, to exercise such control and give such directions. A jury could find from this admitted fact alone that Nichols was really an agent of Respondent and was not an

independent contractor. Also, whether Respondent had the "right" to control Nichols, was a question of fact for the jury to consider. It was one of the very elements included in the definition of independent contractor which Petitioners requested the trial court to present to the jury but which request was refused. (Page 10, *supra.*) The Court of Civil Appeals was clearly wrong in treating this as a question of law for it to decide.

Furthermore, the opinion is so inconsistent that it refutes itself. It denied Petitioners a jury trial by holding there was no evidence from which the jury could answer Petitioners' specially requested issue that Nichols was not an independent contractor. Yet it also holds that the evidence did not establish that Baker was covered by FELA as a matter of law on the basis that there was sufficient evidence favorable to Respondent to raise fact issue which should have gone to the jury on (1) the intent and purpose of Respondent and Nichols in making the contract, and (2) whether the maintenance work of grouting was "regular" maintenance work. It then held that Petitioners waived their right to have these two issues presented to the jury because Petitioners did not request them. (See pp. 37-40, Appendix "A" hereto.)

There can be little, if any, doubt that these two issues are evidentiary issues to be considered in deciding the ultimate issue as to whether Nichols was an independent contractor. See *Atlantic Coast Line R. Co. v. Treadway*, 120 Va. 735, 93 S.E. 560 (1917), cert. den., 245 U.S. 670, 62 L ed 540,

38 S Ct 191 (1918). The jury could have, in determining whether Nichols was an independent contractor, given consideration to the evidence of the intent and purpose of the contract between Respondent and Nichols such as the reason for its indemnity clause or why Respondent could cancel it at will. Likewise the jury could have, in determining whether Nichols was an independent contractor, considered evidence of the nature of the maintenance work done by Nichols. If they found that the maintenance work was an essential part of Respondent's operational duties imposed by law they could have concluded that Nichols necessarily could not be an independent contractor. If they considered it some extraordinary type of maintenance work that could be delegated to an independent contractor then it would be some evidence that Nichols was in fact an independent contractor

Inevitably then if the Court of Civil Appeals' opinion is correct in holding that there was evidence to raise these two evidentiary issues it is incorrect in holding that there was no evidence to raise the ultimate issue of Nichols' status as a contractor. Its denial of a jury trial to Petitioners was clearly incorrect. This case is an excellent example of the lower court failing to respect the jury function in passing on disputed facts and in drawing inferences from proven facts. Therefore this Honorable Court should exercise its discretion to grant this writ. *Wilkerson v. McCarthey*, 336 U.S. 70, 71, 93 L ed 497, 507 (1949).

2. The Writ should be granted because the effect of the decision of the Court of Civil Appeals is to permit Respondent to exempt itself from its liabilities under FELA by a contract in violation of Sec. 55 of FELA.

The law imposes upon Respondent the non-delegable duty to maintain its railroad facilities including of course its tracks and roadbed, Section 1(3), (4) and (21) of the Interstate Commerce Act, 49 U.S.C. Section 1(3), (4) and (21). *Pederson v. Delaware, L & W Ry. Co.*, 229 U.S. 146, 57 L ed 1125, 33 S Ct 648 (1913); *Erie Railroad Co. v. Margue*, 23 Fed. 2d 664; *Atlantic Coast Line Ry. Co. v. Treadway*, 120 Va. 735, 93 So. E. 560 (1917), cert. den., 245 U.S. 670, 62 L ed 540, 38 S Ct 191 (1918). But Respondent has attempted to exempt itself from any liabilities by having a certain type of its non-delegable maintenance work done by Nichols under a contract labeling Nichols an independent contractor and providing that Nichols shall fully indemnify Respondent for any liability arising from the performance of the work. Therefore the contract is void under Section 55 of FELA.

The opinion attempts to avoid the effect of the non-delegable nature of the maintenance work done by indicating that "extraordinary" maintenance work is delegable but "regular" maintenance work is not. But the use of adjectives can not change the fact that the work was one method selected by Respondent to maintain its tracks in a condition required of it by law. The record does not reflect what other methods could have been used. Regardless of the adjectives applied, it was maintenance work essential to the proper and safe function of the railroad and bore a

direct relationship to the operation of the Respondent's main lines in interstate commerce.

The opinion also attempts to avoid the intent "or" purpose of the contract by relying on the opinion of Respondent's assistant chief engineer that the contract was not a scheme or device to get around FELA. Instead it should have applied the rule long ago laid down by this Court in *Philadelphia, Baltimore & Washington R. R. Co. v. Schubert*, 224 U.S. 603, 613, 56 L ed 911, 916, 32 S Ct 589 (1912) that the words "purpose or interest" do not refer simply to an actual intent to circumvent the statute.

> "The 'purpose or intent' of the contract and regulations, within the meaning of the section, is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view."

Petitioners urge this Honorable Court to consider the possible effect this opinion will have upon the future operation of FELA, at least in Texas. Under this opinion it is possible for a carrier to contract for "independent contractors" to do all of its required work except the actual operation of trains. This case is a prime example where certiorari should be granted "to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction." *Rogers v. Missouri P. R. Co.*, 352 U.S. 500, 507, 1 L ed 493, 501, 77 S Ct 443 (1957).

3. The Writ should be granted so that this Honorable Court may consider the important question of whether workers in the position of Claude Baker should be classified employees of carriers within the meaning of FELA.

Baker was, and many workers like him, are doing the carrier's work such as this maintenance work. Their duties are in the furtherance of interstate commerce or their duties directly or closely and substantially affect such commerce. Sec. 51 of FELA. Though by legal form they technically are employees of an "independent contractor" the actual, practical fact is that they are railroad workers giving their labor to the furtherance of the carrier's enterprise and daily exposed to the risks inherent in railroad work. They should be classified as employees of the carrier within the meaning of FELA because they fit the definition of such employees and all the reasons exist for including them under the broad purpose of FELA.

Sinkler v. Missouri P. R. Co., 356 U.S. 326, 2 L ed 2d 799, 78 S Ct (1958) dealt with the scope of the meaning of the word "agent" in FELA. Here we are concerned with the scope of the meaning of the word "employee". Petitioners urge that all the reasons expressed in the *Sinkler* case are also present for giving an accommodating scope to the word "employees" to give vitality to the standard governing the liability of carriers to workers injured while doing the carrier's work. And there is the added fact that the negligence here is that of the Respondent rather than its agent.

In the present case Respondent, rather than doing the necessary maintenance work itself, arranged with Nichols to supply the crew and equipment to perform this work on its behalf. There is no question that this work was done to further the task of Respondent's enterprise; and for purposes of FELA, Baker and the other crew members were as much a part of Respondent's total enterprise as was Respondent's inspector Slaton or its other regular maintenance employees. Even if Nichols was an independent contractor and was really free of detailed supervision of its operations by Respondent, this would be irrelevant, because at the time Baker was killed Nichols' crew members were engaged in furthering the operational activities of Respondent.

Conclusion

The judgment and opinion of the Court of Civil Appeals deprive Petitioners, and those similarly situated, of the right to trial by jury; deprive them of the protection of FELA and allow Respondent to avoid its liabilities under FELA. The opinion is in the teeth of Section 55. For all of the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

HARVEY L. DAVIS,

CALDWELL, BAKER & JORDAN
and KEN R. DAVEY,
Counsel for Petitioners.

APPENDIX A

OPINION, JUDGMENTS AND ORDERS OF COURTS BELOW:

Dovie Ray BAKER et al., Appellants,

v.

TEXAS & PACIFIC RY. CO., Appellee.

No. 15298.

Court of Civil Appeals of Texas.
Dallas.

Dec. 6, 1957.

YOUNG, Justice.

The suit is prosecuted by appellant as administratrix of the Estate of Claude Baker, deceased husband, also as next friend of their three minor children, claiming liability against appellee Railroad Company for his death which occurred August 20, 1952. From a jury trial and finding of contributory negligence on part of said Claude Baker, a defendant's judgment resulted, and this appeal; the trial court rejecting plaintiff's assertion of rights pursuant to 45 U.S.C.A. § 51 et seq., Federal Employers's Liability Act. Defendant Railroad had made W. H. Nichols & Company, Inc., a party hereto, and has appealed from the trial court's adverse ruling on its crossaction for indemnity against Nichols Company in event of liability to plaintiffs; details of which phase of the litigation will later appear.

On April 1, 1952 the Railroad and Nichols Company had entered into a written contract for grouting work between specified mile posts (pumping of sand and cement into roadbed under pressure for strengthening and stabilization). The Nichols Company was engaged in performance of this contract and Claude Baker, deceased, was on the job as one of its employees when struck by defendant's eastbound train. This contract is therefore quoted in full, together with supplement thereto of later date:

> "This Agreement, executed in duplicate April 1, 1952 by and between The Texas and Pacific Railway Company, herein called Carrier, first party, and W. H. Nichols & Company, Inc., Dallas, Texas, herein called Contractor, second party; Witnesseth
>
> "For and in consideration of the keeping by each of the parties hereto of the several covenants and agreements hereinafter set forth, it is hereby mutually agreed as follows:
>
> "1. Contractor shall within thirty (30) days after the execution of this contract begin and diligently prosecute the work described herein until completed in a first class and workmanlike manner and to the satisfaction of the Carrier's Chief Engineer or his duly authorized representative. The work to be done by the Contractor shall consist of:
>
> "Furnishing labor, equipment and water for grouting roadbed on Carrier's double track main line at locations between Mile Post 215, near Dallas, and Mile Post 230, near Arlington, Texas, as specified by Carrier's Chief Engineer or his representative. Area to be grouted consists of a total or approximately 42,040 track feet.
>
> "2. For the faithful performance of the work by the Contractor, The Carrier shall make and Contractor

shall accept payment at prices or rates as follows: $0.10 per linear track foot of roadbed grouted, plus $0.30 per cubic foot of sand pumped into roadbed measured dry. Payment hereunder is to be made promptly upon completion and acceptance of the work, if completed within 30 days; otherwise payment shall be made at the end of each 30 days as the work progresses. Contractor, if called upon, shall furnish Carrier written evidence that he has paid in full all amounts that may be due by him to any and all persons who may perform labor or furnish material or supplies in connection with said work; and in the event he fails to furnish satisfactory written evidence thereof carrier may withhold payment pending receipt of such written evidence.

"As one of the considerations hereof Carrier, insofar as it lawfully may do so shall transport free to the site of the work and, after completion of the work therefrom not exceeding an equal distance, via solely the line of Railway of Carrier, Contractor, Officers, men, teams and equipment actually engaged on or in connection with the work, but excluding fuel, supplies and explosives; and all such transportation shall be at Contractor's risk in case of accident or damage.

"3. In the performance of any of the work or services herein provided, or any part thereof, Contractor shall occupy the status of an independent contractor, and shall not be subject to the detailed supervision and direction of Carrier, but responsible to Carrier only for the final results in the accomplishment of such work or services.

"4. Contractor shall and does hereby assume full responsibility for and agrees to defend, indemnify and hold the Carrier harmless from any and all liability, damage and expense which the Carrier may incur or suffer by reason of (a) any breach by Contract of any of the covenants herein contained, (b) injury to or death of any persons, or loss, damage or destruction

of or delay to any property, arising out of, resulting from or incident to the performance or nonperformance of any of the services and obligations herein assumed by Contractor and (c) transportation of persons and property by Carrier in conformity with paragraph 2 hereof.

"5. Contractor assumes any and all liability and agrees to indemnify Carrier against any and all taxes, contributions and comparable payments imposed by or arising under any municipal, State or Federal law, order or regulation upon or incident to the payment by Contractor of wages, compensation or other forms of remuneration to persons in his employ, performing the services provided for herein, or any part thereof. * * *"

(Supplement)

"December 2, 1952
File: 330-2

"W. H. Nichols & Company, Inc.
3015 Grand Avenue
Dallas 10, Texas

Gentlemen:

"Please refer to our contract dated April 1, 1952, covering grouting of roadbed between our Mile Post 215, near Dallas, and Mile Post 230, near Arlington, unit prices covered by this contract being 10¢ per lineal foot of roadbed grouted plus 30¢ per cubic foot of sand pumped into roadbed, measured dry.

"The above mentioned contract, while not limited as to period of time, is limited as to location of work. We wish to continue this work during the year 1953, working to vicinity of Mile Post 244, just east of Fort Worth. Preliminary survey indicates that we will wish to grout approximately 20,000 lineal feet in addition to that covered by present contract, although it may develop more grouting than this is desired as we proceed with the work.

"If you are agreeable to doing this grouting work as indicated under the same terms as provided in contract dated April 1, 1952, please so indicate by accepting in space provided below and returning original of this letter to me for our record. Yours very truly, (Signed) R. J. Gammie, Chief Engineer. Accepted: W. H. Nichols & Company, Inc. By (Signed) W. E. Nichols, W. E. Nichols Title: President."

Above contract was entered into as a result of appellee having advertised for bids, receiving one other bid from a Fort Worth concern.

Appellants predicate their claim to benefits under the Federal Employers' Liability Act on the following allegations of petition on which they went to trial: "IV. That on or about the 1st day of April, 1952, Defendant, The Texas & Pacific Railway Company, entered into contracts and agreements with W. H. Nichols & Company, Inc. whereby the said W. H. Nichols & Company, Inc. was to perform certain maintenance and repair work on Defendant's roadbed in Dallas County, Texas; *that said work was a part of the regular maintenance and upkeep of Defendant's line of railway track then in use in interstate commerce* and said contract, while purporting to constitute W. H. Nichols & Company, Inc., an independent contractor, *was in truth and in fact an effort and attempt to evade the provisions of the Federal Employers' Liability Act;* that Defendant, Texas & Pacific Railway Company, at all times mentioned in this petition, had the right to control the details and the manner, means and method by which W. H. Nichols & Company, Inc. performed said work." (Emphasis ours.)

Primary points of appeal center on the trial court's re-

fusal to submit plaintiff's issues, 1, 12 and 13. Issues 1 and 13 being similar in form, No. 1 only is quoted along with No. 12: (1) "Do you find from a preponderance of the evidence that with reference to the work W. H. Nichols & Company, Inc. was performing at the time Claude Baker, deceased, was killed, W. H. Nichols & Company, Inc., was not an independent contractor?" (followed by definition of "independent contractor"). Issue 12: "What do you find in terms of percentage to be the entire causal negligence, if any, attributable to Claude Baker, deceased, and that attributable to defendant, Texas & Pacific Railway Company? Answer: Attributable to Claude Baker, deceased, ... per cent. Answer: Attributable to The Texas & Pacific Railway Company, ... per cent."

Original petition of Dovie Ray Baker was in form of an action at common law, suing individually and as next friend of the minor children of herself and husband; in first amended original petition asserting coverage of the Federal Employers' Liability Act; in October 1955, qualifying as administratrix, and in third amended original petition of September 1956, suing as "personal representative" of deceased as required by sec. 53, Title 45 U.S.C.A.; and alternatively as at common law.

This is a second trial of the case. Prior to any suit, however, but following the death of Claude Baker, appellant wife had filed her notice of fatal injury and claim for workman's compensation benefits with the Industrial Accident Board of Texas; both instruments reciting that the employer of deceased was W. H. Nichols & Company, Inc.

Employers Mutual Liability Insurance Company of Wisconsin, compensation carrier, in due course recognized liability and made a lump sum settlement on account of the death of Claude Baker, paying workmen's compensation benefits in the sum of $7,919.94. It was developed from witnesses for plaintiff at the trial that Claude Baker had been hired by Nichols' foreman, who told the crew when to come to work and what to do; when to quit and when the machines were to be moved; that they were paid for their work by Nichols who deducted for their income taxes and social security; that defendant Railway paid them no money, made no deductions from salaries, never told them when to report for work or to quit work; deceased telling his wife that he was employed by W. H. Nichols & Company.

Points of appeal may be summarized in part: The trial court's error (1) in failing to submit plaintiffs' requested issue No. 12, "inquiring as to the percentage of negligence attributable to Defendant and that attributable to Claude Baker, deceased, because the evidence established as a matter of law that Claude Baker was covered by the provisions of the Federal Employers' Liability Act and therefore his contributory negligence was not a complete defense to Plaintiffs' suit but would only diminish their recovery and Plaintiffs were entitled to have their theory of the case submitted in such issue"; (2) in failing to submit issue No. 1 or No. 13, the evidence being sufficient to raise the question of whether or not W. H. Nichols & Company ,Inc., was an independent contractor; (3) in overruling plaintiffs'

objection to a statement made by defense counsel while interrogating the jury panel as a whole "that Plaintiff had filed a claim for workmen's compensation benefits alleging that Claude Baker was an employee of W. H. Nichols & Company, Inc., and had processed that claim to final disposition before the Industrial Accident Board, and in overruling Plaintiffs' motion to instruct the jury not to consider such statement"; (4) in admitting in evidence the notice of injury and claim for compensation "filed by Plaintiffs with the Industrial Accident Board alleging that Claude Baker was an employee of W. H. Nichols & Company, Inc., which were offered by Defendant, and in failing to instruct the jury, as requested by Plaintiffs, that such evidence was admissible for impeachment purposes only"; (5) in permitting counsel for defendant to read to the jury over plaintiff's objection "paragraph 9 of the third amended original answer, wherein reference was made to claim for compensation Plaintiffs had filed with the Industrial Accident Board based upon the assertion that Claude Baker was an employee of W. H. Nichols & Company, Inc"; (6) in failing to grant "Plaintiffs' motion to withdraw from the consideration of the jury notice of injury and claim for compensation filed with the Industrial Accident Board by Plaintiffs, alleging Claude Baker was an employee of W. H. Nichols & Company, Inc., because such evidence, if admissible at all, was admissible for impeachment purposes only, and the court having failed to submit Plaintiffs' theory that Claude Baker was covered by the provisions of the Federal Employers' Liability Act

as an employee of Defendant, such exhibits were not relevant to any issue to be decided by the jury and were highly prejudicial and inflammatory"; (7) in overruling plaintiffs' motion "made prior to the time Plaintiff Dovie Ray Baker took the witness stand, to instruct counsel for Defendant not to interrogate her concerning the Notice of Injury and Claim for Compensation filed by Plaintiffs with the Industrial Accident Board based upon the assertion that Claude Baker was an employee of W. H. Nichols & Company, Inc., and that said claim had been processed to final disposition."

Counterpoints of defendant should be noted in this connection: That the trial court *did not err:* (1, 2) in failing to hold that, as a matter of law, the evidence established that Claude Baker was covered by the provisions of the Federal Employers' Liability Act because there was no evidence (or insufficient evidence of probative force) "that Appellee entered into the contract with W. H. Nichols & Company, Inc. for the purpose or with the intent of evading the provisions of the Federal Employers' Liability Act"; (3, 4) in failing to hold that, as a matter of law, the evidence established that Claude Baker was covered by the provisions of the Federal Employers' Liability Act because there was no evidence (or insufficient evidence of probative value) that the work in question was regular railroad maintenance; (5, 6) in failing to submit plaintiffs' requested issues 1 or 13 because there was no legally competent evidence (or insufficient evidence of probative value) raising the issue as to whether W. H. Nichols & Company,

Inc., was an employee or agent of defendant Railway. Counterpoints 7-11 inclusive argue correctness of the court's ruling with respect to plaintiffs' notice of injury and claim for compensation filed with the Industrial Accident Board as complained of in appellants' points 3 through 7. Cross-assignments of appellee complaining of the court's instruction against it and in favor of W. H. Nichols & Company will be later noticed.

Claude Baker had been a part of the Nichols grouting crew since April 1952, working as cement man; the project having progressed westward to the August location where he sustained fatal injuries. The crew numbered some fourteen men, machine operators, cement and point men, foreman for each machine; and as already stated, the operation consisted of pumping a cement mixture into water pockets, crevices and cracks that might exist in the roadbed.

In support of points 1, 2 and 3, appellant summarizes the testimony of Wm. J. Savage, defendant's Assistant Chief Engineer, and refers to the statement of facts by numbered pages. While appellant's version of certain testimony does not exactly correspond with the record, same will be accepted as true except as challenged by appellee. Savage related that his duties consisted of maintenance of defendant's roadway and tracks; such maintenance was generally to keep the track in safe and good riding condition; elimination of soft spots; "to see that the rails are adequate, and that the track is not allowed to reach condi-

tion that it would be dangerous, and not to allow it to deteriorate to the extent that it would not hold the rails in proper gauge." That Nichols Company was the only contractor doing such type of railroad maintenance in this area; the machines for grouting being available for purchase on the open market. That it was not skilled work in so far as performance by the railroad was concerned, with sand and cement furnished by defendant. That the roadmaster determined track area to be grouted, with no specified number of perforations for grouting, transportation to the job furnished by the railroad. That under the Nichols contract the railroad inspector R. L Slaton was authorized to stop the work if it interfered with operations of trains or was dangerous thereto, and to see that the work proceeded in accordance with the contract. The roadmaster designated and selected work location, and had the right to require performance in a manner which suited his pleasure; the right extending to requiring more perforations if in his opinion not enough had been made. That Inspector Slaton had the right to, and actually did, instruct the Nichols crew as to amount of sand or cement they used in the grouting mixture or as to amount to be pumped under any particular portion of the roadbed, and require them to do the work correctly.

Other of plaintiff's witnesses testified to the following in effect: That during course of the Nichols job, railroad Inspector Slaton was present almost all the time; that he marked the ties between which grouting points would be

inserted; corrected and instructed the mixers if portions of sand and cement were too thin or too thick, and, in case of deficiency, would tell them to correct the condition. That the crew had been told to obey and follow Slaton's instructions; he always telling them when and where the machines were to be moved; Slaton further testifying:

> "Q. Now, there was no particular skill about putting these points in the ground, was there? A. No, sir.
>
> "Q. Most of these men that were working out there were uneducated laboring men, weren't they? A. Well, I wouldn't say that.
>
> "Q. Well, you have been out there with them, you know that they were not men of education and skill and training, don't you? A. Well, part of them were.
>
> "Q. Yes, and there is no skill required in mixing sand and cement there, is there? A. No, sir."

In connection with appellant's above outline of testimony is the statement that the railroad retained the right to terminate the contract at will; challenged by defendant in that there is no provision therein for its termination at will of appellee. Also challenged is appellant's statement with respect to grouting, that: "the work was, in the language of defendant's own chief engineer, just the ordinary maintenance of the railroad." Here defendant points out that only Savage, Assistant Chief Engineer, testified as to whether the work in question was ordinary maintenance or otherwise, and as follows: "Q. Is grouting work simply part of the regular maintenance of the track? A. Yes, I would say that it is; it is not regular maintenance work, but it is a special type maintenance. * * * Q. All right, sir.

And that sort of work, grouting, is that ordinary maintenance of a railroad? A. No, sir, I would consider it rather extraordinary maintenance."

It was stipulated that the double tracks between Dallas and Fort Worth at the point where Claude Baker met his death, were used by trains engaged in interstate as well as intrastate commerce.

[1] Underlying appellant's complaint of error with respect to her refused issue No. 12 is the postulate that either (1) the Nichols contract for grouting defendant's roadbed was on its face an attempt to evade the provisions of the Federal Employers' Liability Act and therefore void, or (2) that the work being performed was in nature of regular maintenance of roadbed, a non-delegable duty of defendant under its franchise; and constituting Nichols Company its agent and Claude Baker, through nominally an employee of another, in effect an employee of the carrier.

Section 51, 45 U.S.C.A., provides: "Every common carrier by railroad while engaging in commerce between any of the several States of Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves,

or other equipment. Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." Section 53 provides for recovery by "such employee" by damages, though guilty of contributory negligence, to be diminished in proportion to the negligence attributable to such employee. Section 55 reads as follows: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: * * *."

The only direct testimony concerning appellee's purpose in making the contract with Nichols Company is that given by Savage, its Engineer, as follows:

> "Q. Now, the plaintiff in the papers filed in this court has alleged in effect that this contract was a scheme or device to get around the Federal Employers' Liability Act. Is that true, Mr. Savage? A. I would say not.
>
> "Q. All right, sir, why did you contract for this work. A. Primarily because we did not have the equipment nor the knowledge that is necessary to do the work.
>
> "Q. All right, sir. And that sort of work, grouting, is that ordinary maintenance of a railroad? A. No, sir.

> I would consider it rather extraordinary maintenance."

There is no evidence that the work of grouting is of a recurring nature or that it had theretofore been done by the railroad.

Obviously, the above state of the record, it cannot be said that the contract on its face demonstrates an evasion of the Federal Employers' Liability Act. Surely, in view of the testimony of Savage, the matter of defendant's "purpose or intent" in making the contract was not without controversy. It may be that an issue of fact could have been premised on prohibited intent or purpose, but none was requested; and "* * * Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; * * *." Rule 279, Texas Rules of Civil Procedure.

It is further argued that the work being performed by Claude Baker was that of ordinary maintenance—a non-delegable duty of defendant—giving rise to an inference that the Nichols contract is "in avoidance of Federal liability" and per se void under the Act, as in Erie R. Co. v. Margue, 6 Cir., 23 F. 2d 664, where the contractor had undertaken with its own employees "to maintain the tracks, roadway, and structures of the railroad company in Ohio"; the court holding that: "* * * The maintenance of defendant's railroad tracks was essential to the exercise of its franchise rights. It undertook to delegate that duty to a construction company, which was largely organized and

controlled by its former employees. We think one of the purposes of its contract with the construction company was to avoid the liabilities of the Federal Employers' Liability Act." But the cited case is not controlling of the instant situation where the process of grouting is described by Savage as maintenance of a special type. More analogous in fact are the holdings in Dougall v. Spokane, P. & S. Ry. Co., 9 Cir., 207 F.2d 843, and Norman v. Spokane-Portland & Seattle Ry. Co., D.C., 101 F. Supp. 350, affirmed 9 Cir., 192 F.2d 1020, certiorari denied 342 U. S. 945, 72 S.Ct. 558, 96 L.Ed. 703.

The case mainly relied upon by appellant in this connection (Cimorelli v. New York Cent. R. Co., 6 Cir., 148 F.2d 575; Pennsylvania R. Co. v. Roth, 6 Cir., 163 F.2d 161, certiorari denied 337 U.S. 830, 68 S.Ct. 208, 92 L.Ed. 404; and Pennsylvania R. Co. v. Barlion, 6 Cir., 172 F.2d 710) bear principally upon their second point, i e., of whether it was the intent of the contracting parties under the particular facts to create a relationship of independent contractor. Furthermore, even viewing the situation most favorably from the standpoint of appellant, still the fact question persists of whether the work of grouting was extraordinary maintenance, as testified by Engineer Savage, rather than ordinary; and again appellant cannot be heard to complain, no request having been made for submission of such an issue.

[2] In point 2 appellant maintains that the evidence, considered most favorably in her behalf, at least raises a fact issue of whether the status of Nichols under the con-

tract and its performance was that of an employee of the railroad rather than independent contractor; the latter term being defined in the charge as: "* * * any person, who, in the pursuit of a business or occupation, undertakes to do a particular work for other persons, and who has control of such work in respect to the details of the work to be performed, and over whom the person for whom the work is being done, has no right or control as to such details, and who represents the will of the person for whom the work is done only as to the result of his work and not as to the means or method by which it is accomplished." Also relevant in the same connection are rules of decision as announced in Cimorelli v. New York Cent. R. Co., supra (Syls. 1, 3, 5, 7): (1) "The words 'employee' and 'employed', within Federal Employers' Liability Act, must be construed in the natural sense and describe the conventional relationship of employer and employee. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51." (3) "In ascertaining when a person is employed of another although his contract of employment is not directly made with such person, each case must be decided on its peculiar facts and ordinarily no one feature of relationship is determinative." (5) "The important test of ascertaining when a person is employee of another, although his contract of employment is not directly made with such person is the control over details of the work reserved by the employer, and to what extent person doing the work is in fact independent in its performance." (7) "The fact of actual interference or exercise of control by employer is not material in determining

whether a person is an independent contractor, but, if existence of right or authority to interfere or control appears, contractor cannot be independent."

[3] Factual background of the point under discussion has already been outlined; it being contended that the control exercised by defendant's Inspector over details of the project and its performance was such as to constitute deceased Baker an employee of the railroad, the contractor occupying the status merely of agent; at least raising a fact issue. We believe the contention to be without merit, considering the terms of the contract and attendant circumstances appearing without dispute. In the first place, the contract was not terminable at will of defendant, specifying merely a given area to be grouted. Where a writing does not fix a definite time for performance, the law imputes a reasonable time. Palmer v. Katz, Tex.Civ.App., 210 S. W. 2d 451. Secondly, this contractor was in the specialized business of grouting. Nichols' foreman hired deceased, told him when to come to work and what to; Nichols paying the crew their wages, deducting for income taxes and social security; firing any if necessary; the railroad performing none of these functions. The contract stated that Nichols should not be subject to detailed supervision and direction of the carrier; defendant, however, being the only one familiar with its own roadbed, the contract provided that work of grouting should be done at locations as specified by Carrier's Chief Engineer or his representative. The instructions given by Inspector Slaton concerning details of the work, here emphasized by

appellant, are simply referable to the contract in question and his duty to require its satisfactory performance. The *fact* of actual interference or exercise of control by the employer is not material, absent the *right* or authority to interfere or control; Cimorelli v. New York Cent. R. Co., supra. "The mere right of a person who has let out a contract, to supervise the work in such a way as to see that it is performed according to contract, does not make the employees of the contractor his employees. Simonton v. Perry, Tex.Civ.App., 62 S.W. 1090; Smith v. Humphreyville, 47 Tex.Civ App. 140, 104 S.W. 495 writ of error refused; American Indemnity Co. v. Dinkins. Tex.Civ.App., 211 S.W. 949, writ of error refused." Security Union Ins. Co. v. McLeod, Tex.Com.App., 36 S.W. 2d 449, 451. Nor was the presence of appellee's Inspector, with authority to see that there was no interference with operation of trains, such an assumption of control as to make of Nichols its agent or employee. Dougall v. Spokane, supra.

On the facts, appellant's leading case of Cimorelli v. New York Cent. R. Co., supra, is hardly in point. There the agreement with Duffy as independent contractor, so-called, was on a cost plus basis; the contract itself disclosing that "full control over the means and manner of performance of the contract was reversed to appellee and that there was left in the contractor no independence." Controlling of the issue at hand, in our opinion, is Chicago, Rock Island & Pacific Ry. v. Bond, 240 U.S. 449, 36 S.Ct. 403, 406, 60 L.Ed. 735, involving, as here, instructions given by the railroad to Turner, the contractor; the U. S. Supreme

Court holding in part: "The railroad company, therefore, did not retain the *right* to direct the manner in which the business should be done, as well as the results to be accomplished, or, in other words, did not retain control not only of what should be done, but how it should be done." (Emphasis ours.)[1]

[4] Appellant's remaining points, 3 to 7 inclusive (already quoted in substance), must be prefaced by the following facts as reflected in the four bills of exception: In addressing the jury panel on voir dire defense counsel stated that plaintiff had filed her notice and claim with the Industrial Accident Board, not advising the panel, however, of whether compensation had been allowed or denied. Thereafter plaintiff's counsel, in absence of jury, made to the court motions as follows: That defense counsel be instructed, when Mrs. Dovie Ray Baker later became a witness, that she not be interrogated relative to said claim for compensation filed with the Industrial Accident Board or amount of the award (stating grounds), the court granting the motion to the extent that counsel may not refer to any amount received by plaintiff and overruling same to the extent that inquiry could be made "into the filing of a claim with the Industrial Accident Board and the necessary elements including filing of the claim and that a final rul-

[1]Also quite dissimilar in fact are appellants' Texas cases of Gulf Refining Co. v. Rogers, Tex. Civ. App., 57 S. W. 2d 183, and Humble Oil & Refining Co. v. Martin, 148 Tex. 175, 222 S. W. 2d 995, 998. There the writings, referred to as commission agency contracts, were terminable at will of the Oil Company; in both cases the Company reserving extensive right of control; in one (Rogers) even to right to discharge employees of the lessee; in the other (Martin) the contract requiring Schneider, lessee, in addition to supervision strongly suggestive of a master-servant relationship, to perform such other duties in connection with the operation of his station as may be required of him "from time to time by Company."

ing was made by the Industrial Accident Board, without reference to what the ruling was." That plaintiff's counsel then moved the court to instruct the jury that the testimony in question be limited to impeachment purposes only or to show that plaintiff had made a prior inconsistent statement; the court indicating that it would probably instruct the jury to effect that the particular testimony was admissible for the purpose of showing "prior inconsistent position of the plaintiff." Defense counsel then questioned the plaintiff fully with respect to the matter, including processing of claim to final disposition, the court not later limiting the testimony to impeachment purposes. A similar motion was made to defendant's pleading of plaintiff's notice of claim, sustained to the extent that defendant's counsel was instructed not to read allegations relative to collection of compensation; and lastly, the particular exhibits (notice and claim) were permittedly taken to the jury room over plaintiff's objection. To none of above court rulings did plaintiff make or urge a motion for mistrial.

It will be noted that during course of the trial these exhibits had bearing on the issue of whether deceased Baker was an employee of the railroad rather than of Nichols within meaning of the Federal Employers' Liability Act, the court rejecting plaintiff's theory of Federal coverage; and submitting the case to the jury only as a common-law action. The later taking of notice and claim into jury room was objected to by appellant, "for the reason that said exhibits at this stage of the proceedings are highly prejudicial and inflammatory and have no bear-

ing on any issue in this case, the court having failed to submit plaintiff's theory that the deceased, Claude Baker, came under the terms and provisions of the Federal Employers' Liability Act and such claims being admissible if at all in the first place only on the question of showing that the plaintiffs had taken an inconsistent position before the Industrial Accident Board, with the position that they are now taking in this case; that to permit the jury to take these exhibits into the jury room is calculated to cause them to discuss and consider the question of whether or not plaintiff and her children have been fully compensated for this injury by having made claim to the Industrial Accident Board of the State of Texas upon the death of Claude Baker as an employee of W. H. Nichols Company, Inc."

In above connection, the jury found that defendant's engine men failed to exercise ordinary care in warning of approach of train and that such failure was a proximate cause of Claude Baker's death; likewise finding that Baker's failure to keep a proper lookout was a proximate cause of his death; also that prior to the arrival of the train, deceased was in a place of safety, stepping therefrom into path of the train when he knew or should have known of its approach, such action being a proximate cause of death. The jury assessed damages in the total amount of $28,045. All other issues were answered against the party relying thereon. At time of death Claude Baker was 56 years of age.

The trial court should have withheld the exhibits in question from any consideration by the jury in their delib-

erations because, on refusal of plaintiff's requested issues, they had no bearing upon any of the issues raised under the court's charge; the court's ruling, however, amounting to no more than harmless error. Rule 434, T. C. P. The objectionable instruments were in no wise relevant to the issues on contributory negligence found against deceased; the jury awarding substantial damages—an amount not so low as to demonstrate that the jury was motivated by prejudice, bias or other improper motives, and appellant does not so claim. In fact, from the record as a whole, there appears nothing to indicate that plaintiff suffered probable harm from admission of the exhibits or matters relevant thereto as complained of by appellant.

All points of error, upon careful study, are overruled; an affirmance of this judgment rendering unnecessary any discussion of counterpoints brought forward by appellee.

Affirmed.

No. 15,298

DOVIE RAY BAKER, et al.,

v.

TEXAS & PACIFIC RY. CO.,

From District Court of Dallas County,
Friday, December 6th, 1957

Opinion of the Court delivered by Mr. Young, Associate Justice.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is in the

opinion of the Court that there was no error in judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be, in all things, affirmed; that the appellees, Texas & Pacific Railway Company and W. H. Nichols & Company, have and recover of the appellant, Dovie Ray Baker, individually and as Administratrix of the estate of Claude Baker, and as next friend of her minor children, Bobby Glen Baker, Claudette Baker and Oleta Fay Baker, and of Standard Accident Insurance Company, her surety upon appeal bond, all costs in this behalf incurred or expended, for which execution may issue; and that this decision be certified below for observance.

DOVIE RAY BAKER

15346
15298

v.

TEXAS & PACIFIC RY. CO.,

Friday, January 17, 1958

This day came on to be heard the motion of appellant for rehearing of this cause, and the same being inspected, it is considered, adjudged and ordered that the motion be overruled.

"IN THE SUPREME COURT OF TEXAS

April 30, 1958

No. A-6718

DOVIE RAY BAKER, et al.,

v.

TEXAS & PACIFIC RY. CO.,

From Dallas County

Fifth District.

"This day came on to be heard application of petitioners for a writ of error to the Court of Civil Appeals for the Fifth District, and, after due consideration, the Court having determined that the application presents no error which requires a reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused; that the applicants, Dovie Ray Baker, individually, and as Administratrix of the estate of Claude Baker, deceased, and as next friend of her minor children, Bobby Glen Baker, Claudette Baker and Oleta Fay Baker, and their surety, Standard Accident Insurance Company, pay all costs incurred on this application."

"June 18, 1958.

No. A-6718

DOVIE RAY BAKER, et al.,

v.

TEXAS & PACIFIC RY. CO.,

From Dallas County.

Fifth District.

"This day came on to be heard petitioners' motion for rehearing of application for writ of error, and, after due consideration, it is ordered that said motion be, and is hereby, overruled."

APPENDIX B

CONSTITUTIONAL PROVISION AND STATUTES

THE 7TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

In suits at law, where the value in cortroversy shall exceed $20,000, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

FEDERAL EMPLOYERS LIABILITY ACT, 35 Stat. 65, 66, 53 Stat. 1404, 45 U.S.C., Sec. 51 and 55

Section 51. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, ma-

chinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Section 55. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

INTERSTATE COMMERCE ACT, 41 Stat. 474, 49 U.S.C., Sec. 1 (3), (4) and (21)

Section 1.

(3) *Definitions.* The term "common carrier" as used in this chapter shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies;

and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "transmission" as used in this chapter shall include the transmission of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio apparatus, or other wire or wireless conductors or appliances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages.

(4) *Duty to furnish transportation and establish through routes; division of joint rates.* It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable division thereof as between the carriers subject to this chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(21) *Power of Commission to require adequate facilities or extension of line—Penalty.* The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part [§ 1-5, 5b-15a, 16, 17-23, 26, 27 of this title] party to such proceeding to provide itself with safe and adequate facilities for performing as a common carrier its car service, as that term is used in this part [§ 1-5, 5b-15a, 16, 17-23. 26, 27 of this title], and to extend its line or lines: Provided, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity,

or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any public carrier subject to this part [§ 1-5, 5b-15a, 16, 17-23, 26, 27 of this title] which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue in the United States and may be recovered in a civil action brought by the United States.